Demolition Workers Union Local 95, AFL–CIO *and* Mackroyce Dismantling, Ltd. Case 29–CB–10362

December 21, 1999

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On February 17, 1999, Administrative Law Judge Margaret M. Kern issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Intervenor, the New York City Demolition Contractors' Association, Inc., filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Demolition Workers Union Local 95, AFL–CIO, Bronx, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to sign the collective-bargaining agreement between the Union and Mackroyce Dismantling, Ltd.

(b) Picketing Mackroyce at any location where it conducts business in order to compel Mackroyce to renegotiate the terms of the collective-bargaining agreement.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, execute the collective-bargaining agreement agreed to by the Union and Mackroyce Dismantling, Ltd.

(b) Within 14 days after service by the Region, post at its business office and meeting hall copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix" to all of its members who were employed by Mackroyce Dismantling, Ltd. at any of its locations and jobsites since August 17, 1997. The notice shall be mailed to the last known address of each such member after being signed by the Respondent's authorized representative.

(d) Sign and return to the Regional Director copies of the notice for posting by Mackroyce Dismantling, Ltd., if willing, at all places where notices to employees are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

[1] No party has excepted to the judge's findings that the Respondent violated Sec. 8(b)(3) of the Act by: (1) failing to execute the collective-bargaining agreement between the Respondent and Charging Party Mackroyce Dismantling (Mackroyce); and (2) picketing a Mackroyce jobsite in order to force Mackroyce to renegotiate the terms of the collective-bargaining agreement previously agreed to by the Respondent.

[2] The Respondent excepts to the judge's finding that Mackroyce "has been making fringe benefit contributions" since its execution of the collective-bargaining agreement, to the extent it implies that Mackroyce has been making *timely* fringe benefit contributions under the agreement. We find merit in this exception. Mackroyce's president Peter D'Agostino, testified that it is behind "over two months" in payments to the union fringe benefit funds.

[3] We have deleted the general injunctive "like or related" language from the recommended Order because no violation of Sec. 8(b)(1)(A) has been found, and Sec. 8(b)(1)(A) is not a derivative violation of an 8(b)(3) violation. *California Nurses Assn. (Alta Bates Medical Center)*, 326 NLRB 1362 fn. 1 (1998). In addition, we do not adopt pars. 2(b) and (c) of the judge's recommended Order, providing for a make-whole remedy for unit employees employed by Mackroyce, as a result of the Respondent's unlawful failure to execute the contract and subsequent picketing. In this regard, we note, inter alia, that neither the General Counsel nor the Charging Party has requested a make-whole remedy. We have also substituted a new notice reflecting these modifications.

In agreeing that a make-whole remedy is not appropriate for the Respondent's violations of Sec. 8(b)(3), Member Liebman relies on *Painters (Northern California Drywall Assn.),* 326 NLRB 1074 (1998) (Board did not adopt judge's recommended Order requiring union to make whole bargaining unit employees for losses suffered by reason of union's failure to honor and abide by collective-bargaining agreement); *Service Workers, Local 427, Teamsters (Edward D. Sultan Co.)*, 223 NLRB 1342 (1976) (Board did not adopt judge's recommended Order requiring union to make whole bargaining unit employees for losses suffered by reason of the union's 8(b)(3) violations, including its refusal to sign agreed-upon contract and its causing a strike), enfd. 95 LRRM 2985 (9th Cir. 1977).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT fail or refuse to sign the collective-bargaining agreement agreed to by us and Mackroyce Dismantling, Ltd.

WE WILL NOT engage in picketing of Mackroyce Dismantling, Ltd. in an effort to compel Mackroyce Dismantling, Ltd. to renegotiate the terms of the collective-bargaining agreement agreed to by us and Mackroyce Dismantling, Ltd.

WE WILL, on request, execute the collective-bargaining agreement negotiated and agreed to by us and Mackroyce Dismantling, Ltd.

DEMOLITION WORKERS UNION LOCAL 95, AFL–CIO

Richard Bock, Esq., for the General Counsel.
Andrew A. Gorlich, Esq. and *Barbara S. Mehlsack, Esq.,* for the Respondent.
Irwin M. Echtman, Esq. and *David Etkind, Esq.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me on April 21, June 2 and 3, 1998, in Brooklyn and New York, New York. The complaint, which issued on December 31, 1997,[1] is based on an unfair labor practice charge filed by Mackroyce Dismantling, Ltd. (Mackroyce) on October 23 against the Demolition Workers Union Local 95, AFL–CIO (Respondent or Local 95).

It is alleged that since on or about August 16 Respondent has failed and refused to execute a collective-bargaining agreement that was reached between Respondent and the New York City Demolition Contractors' Association (the Association) and to which Mackroyce agreed to be bound. It is further alleged that on October 21, Respondent engaged in a strike and picketing at a Mackroyce jobsite in order to compel Mackroyce to renegotiate terms of the agreement previously reached. By these actions, the General Counsel avers that Respondent violated Section 8(b)(3) of the Act. Respondent does not dispute that it has failed to execute the collective-bargaining agreement and that it engaged in the strike and picketing. It defends its actions on the ground that a final, complete agreement was never reached. Alternatively, Respondent argues that the agreement was negotiated by an agent acting outside the scope of her authority. Respondent also argues that the agreement is an illegal members-only contract and contains an unlawful union-security clause, both of which provisions render the agreement unenforceable.

For the reasons set forth here, I find that Respondent has unlawfully failed and refused to execute the terms of the agreed-upon collective-bargaining agreement in violation of Section 8(b)(3). I further find that Respondent violated Section 8(b)(3) by engaging in a strike and picketing in order to compel Mackroyce to renegotiate the terms of that agreement.

[1] Unless indicated otherwise, all dates referred to here relate to the year 1997.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that Mackroyce is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Association is composed of construction industry employers engaged in the demolition business in New York City and has been in existence for about 20 years. Respondent has represented employees in this industry for at least the same period of time. One function of the Association is to negotiate collective-bargaining agreements on behalf of employers in the industry with Respondent. The most recent collective-bargaining agreement was effective July 1, 1993, to June 30, 1997. On February 15, 1995, Peter D'Agostino, president of Mackroyce, executed the 1993–1997 agreement. This was the first collective-bargaining agreement between Mackroyce and Respondent. [3]

Christine McKenna became the president and business manager of Respondent in 1993. In April 1996, Respondent affiliated with the Laborers International Union of North America (International) and with its subordinate body, the Mason Tenders District Council of Greater New York (the Mason Tenders). Since January 1994, the Mason Tenders and its constituent locals have been operating under a consent decree entered in United States District Court, Southern District of New York

[2] At the conclusion of the hearing, errors by the reporting service in marking exhibits were discovered. The parties agree that Respondent's Exhibit (R. Exh. 1) and the General Counsel Exhibit (GC Exh. 7) were received in evidence. The parties further agree that R. Exh. 27 was rejected and R. Exh. 40 was withdrawn. By motion dated August 31, 1998, the General Counsel moved to amend the transcript which motion is received in evidence as GC Exh. 26. By motion dated October 13, 1998, Respondent moved to amend the transcript and opposed in part the General Counsel's motion to amend. Respondent's motion is received in evidence as R. Exh. 41. To the extent that each of these motions are unopposed, they are granted. General Counsel's corrections #2 and #19 are denied for the reasons set forth in Respondent's opposition. General Counsel's corrections #20 and #27 are granted over Respondent's objection in that the General Counsel's amendments reflect the accurate transcription.

[3] A great deal of testimony was adduced on the question of whether the Association constitutes a multiemployer bargaining association and whether Mackroyce has ever been a member of the Association. The General Counsel, however, does not rely on the existence of a multiemployer bargaining association to establish Respondent's unfair labor practices. The General Counsel's position is that Mackroyce is entitled to the benefits of the collective-bargaining agreement negotiated between the Association and Respondent by virtue of the "me-too" agreement, which it signed in mid-July. Respondent concedes this point in its brief. It is therefore unnecessary to set out in detail all of the testimony on the multiemployer issue, and I make no finding with respect to the existence of a multiemployer bargaining association.

(Sweet, J). When Respondent affiliated with the Mason Tenders in 1996, it was bound by the same consent decree. The International operates under the supervision of the U.S. Department of Justice.

A few months after the affiliation, Richard Ello, a representative of the International, had a conversation with McKenna about the 1993–1997 agreement. Ello criticized a number of provisions that were in the agreement, and criticized the fact that provisions that should have been in the agreement were not included. He told her that the wage and benefit rates in the agreement "were exceedingly substandard," that the enforcement procedures for collecting fringe benefit contributions were deficient, and that the contract lacked any limitation on the number of employees employers could keep in lower paying job classifications. Ello gave McKenna copies of other contracts in the industry so that she would see what conditions to insist on in future negotiations.

B. The 1997 Negotiations

By letter dated May 29, Respondent notified Irwin Echtman, counsel to the Association, that the collective-bargaining agreement was to expire on June 30 and requested that bargaining commence for a successor agreement. The first negotiating session took place on June 5. Present for the Association were Echtman and three employer representatives (not D'Agostino). Present for Respondent were McKenna, Phil Chillack, vice president, and Roger Madon, counsel to Respondent. At this meeting Madon distributed a draft of an agreement and stated, "this is what we would like." General conversation followed and the meeting ended. The following day, Echtman sent Respondent's proposed agreement to the Association's members, including Mackroyce, with a cover letter soliciting comments.

On June 22, Echtman and Madon met in Echtman's office. Echtman testified:

> We went through the contract paragraph by paragraph to see as to which paragraphs we had an agreement, which paragraphs we had a likely agreement, which paragraphs we had no agreement, which paragraphs would have to be referred to our respective clients to try to work out.

The next bargaining session took place on June 23 and Echtman, the Association negotiating committee, Madon, and McKenna were in attendance. Following the meeting, Echtman again solicited feedback from Association members and was advised that the wage and benefits structure was acceptable and that Echtman was "to try to keep the language of the contract as close to the prior contract as possible, particularly with respect to the shop steward."

At the next meeting on July 8, Echtman advised McKenna and Madon as follows:

> We said that we had an agreement on wages, on contributions, and we had a deal and we still had an open issue with respect to shop stewards and at that meeting McKenna agreed to utilize the language of the prior agreement and at that point she said she was going off to a ratification meeting.

At the conclusion of the July 8 meeting, it was agreed that Madon would prepare the final written agreement and send it to Echtman. Echtman testified that there was complete agreement on all issues by the end of the July 8 meeting. Madon first testified that by July 8, the parties had reached agreement on "substantial aspects of the collective-bargaining agreement having to do with wages and benefits and most of the important ones. The only thing that was outstanding was the shop steward clause, which had not yet been codified or resolved on July 8 we definitely came to a final decision as to what the wage structure and the benefit structure would look like." Madon later equivocated in his testimony and stated that it could very well have been that the shop steward issue was also resolved on July 8. On the evening of July 8, McKenna presented the terms of the agreement to her membership and the agreement was ratified.

The next day, July 9, the employer members of the Association received a letter by fax transmission from Respondent signed by McKenna. The letter stated that the new collective-bargaining agreement had been ratified by the membership and that pursuant to the terms of that agreement, the amount of assessments to be taken out of union members pay was $1 per hour for every hour worked, retroactive to July 1.

In mid-July, Respondent sent D'Agostino a "me-too" agreement whereby Mackroyce agreed to be bound by the collective-bargaining agreement negotiated between Respondent and the Association. Mackroyce was the only employer to whom Respondent submitted a "me-too" agreement. D'Agostino signed the agreement and returned it to Respondent.

Echtman did not receive the final draft from Madon until shortly before July 21. According to Echtman, Madon's draft required so many corrections that Echtman told Madon, "forget it Roger, you'll never get it right, I'll do it." Madon testified that he was very rushed at the time and the errors were inadvertent drafting errors, not substantive changes.

By letter dated July 28, Echtman sent Madon a final draft. About a week later, Madon told Echtman that he had "a couple of minor changes" and asked Echtman to incorporate those changes and to re-draft the final agreement. This was done and by letter dated August 11, Echtman wrote to Madon:

> Enclosed please find a copy of what should be the final draft of the collective-bargaining agreement. I do not believe there remain any open issues. Please let my office know whether the enclosed draft is satisfactory in form. If it is, I will circulate it among the members of the New York City Demolition Contractors' Association for signature. We will then seek the Union's counter-signature.

After he sent the final draft to Madon, Echtman left for an overseas vacation. On August 14, Madon sent a letter by fax transmission to Echtman complaining that the final draft did not include a provision, previously agreed to by the parties, giving Respondent the right to withdraw its members from a jobsite for failure of an employer to remit dues. Madon also spoke to Etkind by telephone. Etkind contacted Echtman and Echtman said that Madon was correct, that it was an inadvertent omission on his part, and that the language should be added. Etkind inserted the provision as section 30(d) of the agreement. Madon's testimony conforms to Echtman's and Etkind's on this point. With the insertion of section 30(d), there was, according to Echtman and Madon, a final written agreement which reflected the full agreement of the parties.

Etkind testified that on August 20 he received a very brisk phone call from Madon demanding to know what was happening and where the signed contracts were. Madon testified that he placed that call at McKenna's prodding, and that Etkind told him that he thought that the contracts had been sent out or were about to be sent out for employers' signatures.

Madon testified that there was not a doubt in his mind that the parties reached agreement on all issues prior to August 21, the date that the International placed Respondent under trusteeship, removed McKenna from office and removed Madon as counsel. Madon admitted, however, that he had previously made statements to the contrary. Madon admitted that on August 22 or 23, he spoke to a group of Respondent's members and "gave them the impression that there was no meeting of the minds and that an agreement had not been reached." He also told them that since the agreement had not been signed, it could not be given effect. By way of explanation, Madon testified that at the time he made these statements he was representing the personal interests of McKenna and advancing her political agenda. "It favored my client. . . . I could defend it. . . . It was not a position that was so radical that it could not be defended. I wouldn't have said it if I felt it was absolutely untrue. It was certainly defensible. . . . If my client comes to me and says this is the position I want to take and there is some reasonable position that can be defended, I take it."

C. The Imposition of the Trusteeship

On August 21, Echtman received a telephone call from Etkind advising him that the International had imposed a trusteeship over Respondent and that both McKenna and Madon had been removed. Echtman and Etkind discussed how these events would affect the recently reached agreement. Echtman contacted some of the Association members and it was resolved that they would "let the dust clear and do nothing."

On the evening of August 21, Etkind and two members of the Association's negotiating team met with Madon, McKenna and Chillack. It was Etkind's understanding that Madon no longer represented Local 95, but was present as the attorney representing the individual interests of McKenna and Chillak. Madon stated that he could set up a rival union and that without signatures on the collective-bargaining agreement, there would be no contract-bar problem. Madon said he wanted to take the same exact agreement as had been agreed upon, delete the name of Local 95 and insert the new, rival union's name. He also said that they wanted to transfer money from Respondent's employee benefit funds to the new union. Etkind listened and made no commitments.

On August 22, Madon called Echtman and repeated to him the substance of what he had said the night before. He told Echtman that his clients, McKenna and Chillack, were working to set up another union and they were intending to transfer the money in the benefit funds. Echtman told Madon in no uncertain terms that his plan should be abandoned and that there was no way that the employers would permit the funds to be touched.

On August 23, Echtman, who was still overseas, spoke to Ello by phone. Ello told Echtman that the trusteeship had been declared because McKenna had run Local 95 into bankruptcy while at the same time making representations to the International that the local was fiscally secure. Ello said that the International was trying to obtain Respondent's records but was having some difficulty because McKenna had apparently removed them. Ello also expressed a fear that McKenna and/or Madon would attempt to move funds to a new union and Echtman assured him that he would not allow that to occur. During the course of the conversation, Ello told Echtman that he had learned of the recently negotiated agreement and that he had "some problems" with it. Specifically, Ello said that the agreement exceeded the geographical limitations or authority of Local 95, and further, that it exceeded the work jurisdiction that had been ceded to Local 95 by the International vis-à-vis the jurisdiction of the Mason Tenders. Echtman asked Ello if these two problems were fixed, would the Agreement then be acceptable. Ello said he had no problem with the rest of the agreement, but that he wasn't ready to commit to a position at that time.

D. Mckenna's Status as an Agent of Local 95

By the terms of Respondent's bylaws, McKenna, as business manager, possessed the authority to negotiate, execute and administer all collective-bargaining agreements. By the terms of the affiliation agreement with the International, McKenna expressly retained the same authority:

> Local 95's collective bargaining agreements into which employers have entered or will enter with Local 95 shall remain and be in the name of Local 95, only. The Business Manager has full authority to negotiate any an [sic] all collective bargaining agreements on behalf of Local 95 within its trade jurisdiction or jurisdiction outside the International and that Local 95 shall be the sole signatory on all such collective bargaining agreements.

Echtman testified that prior to August 22, he never received any indication from anyone that McKenna did not represent Respondent or was limited in her authority. Madon testified that during the entire course of the negotiations, up until the imposition of the trusteeship on August 21, he understood that McKenna had the authority to bind Respondent.

Ello testified that because the International and Respondent were operating under a consent decree, Respondent was obligated to include certain provisions in the collective-bargaining agreement it reached with the Association. Ello further testified that he informed McKenna of this obligation on a number of occasions. He told her that the agreement had to contain specific provisions relating to hiring halls, shop stewards, and employer contributions to the Union's training fund. Each time Ello gave McKenna these instructions, McKenna agreed that she would abide by them. None of these provisions, however, were included in the final agreement. Ello acknowledged that there are occasions when the International participates in collective-bargaining negotiations between a local union and employers, but that did not occur in this case because he relied on McKenna's representations that she was complying with his instructions. Ello was aware that from June through August, McKenna was negotiating with Echtman, and he was specifically aware that draft agreements were being circulated in July. He admitted, however, that at no time prior to August 21 did he notify Echtman, or any other employer representative, that the International was revoking McKenna's authority to negotiate on behalf of Respondent or that her authority was in any way limited.

Ello characterized McKenna's behavior as erratic and strange in the summer months of 1997. At times, she would speak with him very frequently, and then he would not hear from her for several weeks. In June, McKenna threatened Ello that if the International did not give Local 95 a loan, she would negotiate a contract with employers which would exceed the jurisdiction of Local 95 and impinge on the jurisdiction of the Mason Tenders. On June 17, McKenna filed a petition for bankruptcy for the local which Ello did not find out about until

early August. When Ello asked McKenna in July for copies of the draft agreements being circulated, she refused. Even more disturbing, Ello testified that members of Local 95 and other witnesses were giving sworn statements that cocaine parties were being held in Respondent's offices. He was aware that the Department of Labor had a Local 95 field representative serving as a confidential informant. The day after the trusteeship was imposed, the field representative's body was discovered at a construction site with a gunshot wound to the head. In the words of Ello, "[I]t was a very dangerous situation . . . it was horrible—it was a nightmare." I asked Ello if he was aware of the allegations of drug use and criminality in June and July 1997 and he acknowledged he was aware of these activities in July.

E. Mackroyce Executes the Agreement

Mackroyce and nine member employers of the Association executed the final draft of the agreement on or about August 25.[4] Thereafter, Echtman met with Ello and asked him whether he would go along with the previously agreed to and executed agreement. Ello told Echtman that he would have to discuss it with Andrew Gorlich, new counsel for Respondent. At a meeting between Echtman and Gorlich on September 18, Gorlich gave Echtman a 26-page proposed collective-bargaining agreement that was radically different from the one previously negotiated. Echtman glanced quickly at it and said: "Andrew, I'm sorry, I'm not renegotiating an agreement, we have an agreement already."

Since D'Agostino executed the agreement, he has been notifying Respondent whenever Mackroyce starts a new job and has been paying his employees the wage rates as specified in the agreement. In addition he has been making fringe benefit contributions which have been accepted by Respondent.

F. Picketing at a Mackroyce Jobsite

In August, Mackroyce obtained a subcontract to perform demolition work at the United States Tennis Center in Queens, New York. On October 21, Respondent picketed Mackroyce at the site, other trades refused to cross the picket line and the work stopped. Shortly thereafter, D'Agostino met with Ello who told him that the agreement was not valid and in order for the picketing to end, he would have to sign a different contract with Respondent. D'Agostino told Ello that he already had a contract with Respondent.

G. Relevant Portions of the Agreement

Article 1(a) of the agreement provides:

> The Employer recognizes the Union as the only union representing barmen, barmen's assistants, helpers and working foremen employed on all work covered by this Agreement, and agrees to deal collectively only with this Union for and on behalf of these employees on all of its work sites.

Article 1(b) of the agreement provides:

> Membership in the Union shall be required as a condition of employment in accordance with and subject to the restrictions now contained in the National Labor Relations Act, or any further amendments thereto.

Article 3(a) of the agreement provides in relevant part:

> After a Helper, while working for any signatory Company, acquires two (2) years of continuous membership in good standing in the Union, the Company in which he is currently working shall transfer him to a Barmen's Assistant at the rate then in effect.

Article 24 of the agreement provides:

> If any provisions of this Agreement shall be held or declared to be illegal or of no legal effect, said provision shall be deemed null and void without affecting the obligations of the parties under the remaining terms of this Agreement.

IV. ANALYSIS

A. Credibility

I credit the testimony of Echtman and Etkind without hesitation. Both were forthright and direct, and their testimony was consistent with the documentary evidence presented. Madon, on the other hand, was far less impressive. Notwithstanding his explanation, the fact is that he made material misrepresentations regarding the status of negotiations to members of Local 95 because it was expedient to do so at the time and advanced not only his clients' interests, but his interests as well. Where there is a conflict in their testimony, I credit Echtman and Etkind over Madon. Ello was generally a credible witness but his recollection of specific conversations was not as precise as Echtman's recollection. Where there is a conflict in their testimony, I credit Echtman over Ello. McKenna was not called by either side as she could not be located at the time of the hearing. I decline to draw an adverse inference against any party for her failure to appear.

B. The 8(f) or 9(a) Relationship

It is the position of both the General Counsel and Respondent that the collective-bargaining relationship between Respondent and the Association and between Respondent and Mackroyce is governed by Section 8(f) of the Act. The Association, as intervenor, argues that these are 9(a) relationships. The Association's argument is without merit.

By the terms of the 1993–1997 collective-bargaining agreement, Respondent is recognized as the "only" union representing employees on each employer's worksites. The same language appears in the new agreement. There is no statement of exclusive majority status. Nor is there any evidence that Respondent ever made a claim of majority status, either of the employees employed by Mackroyce, or amongst the employees of all the members of the Association. Madon was asked if he knew of any occasion when McKenna went to employers with authorization cards and claimed majority status and Madon said knew of no such demand.

In *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board determined that there is a presumption of an 8(f) status for employers in the construction industry, and the burden of proof is on the party asserting the existence of a 9(a) relationship. Id. at 1385 fn. 41. More recently, in *Oklahoma Installation Co.*, 325 NLRB 741 (1998), the Board stated: "In several decisions subsequent to *Deklewa,* the Board has explained that a union may prove the existence of a 9(a) relationship by submitting positive evidence that it unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such." There is absolutely no evi-

[4] The agreement which Mackroyce executed, and which is alleged by the General Counsel to be final agreement of the parties, is in evidence as G.C. Exh. 6.

dence of any such request by Respondent or the acceptance of any such request either by Mackroyce or by the Association. This is clearly an 8(f) relationship and I so find.

C. Meeting of the Minds

Echtman's credible testimony establishes that by the conclusion of the July 8 meeting, full and complete agreement had been reached on all issues. Echtman's testimony is also corroborated by the documentary evidence. On July 9, McKenna's faxed a letter to the employer members of the Association stating that the "new collective bargaining agreement" had been ratified by the membership, and notifying them of a new assessment established by the agreement. The only evidence to the contrary is the equivocal testimony of Madon that after the July 8 meeting it is possible that there was a remaining issue with respect to shop steward language. For the reasons previously discussed, I credit Echtman's testimony over that of Madon's, and I find that the shop steward issue was resolved on July 8 as were all other issues. After July 8, the parties had difficulty properly committing the agreed-to terms to writing. There is no evidence that the inability to produce a final written agreement from July 8 to August 14, however, was as a result of disagreement on substantive issues. Rather, the evidence establishes that the reason for the multiple drafts sent back and forth between Echtman and Madon was inadvertent drafting errors by both sides.

The obligation of the parties to sign a written agreement encompassing the terms agreed to during collective bargaining has long been recognized. *H. J. Heinz Co. v. NLRB,* 311 U.S. 514 (1941). The ultimate question in these cases is, of course, whether there was a meeting of the minds on all material terms of the contract, and the burden of proof on this issue rests with the General Counsel. *Teamsters Local 287 (Read & Graham),* 272 NLRB 348 (1984). I find the General Counsel has convincingly satisfied that burden and that there was a meeting of the minds on all material terms on July 8. That there was a delay in accurately reducing those terms to writing due to drafting errors does not relieve Respondent from its obligation to execute the agreement once it was in final agreed-upon form.

D. Agency Status of McKenna

Respondent further defends its refusal to sign the agreement on the ground that even if there was an agreement prior to August 21, McKenna was acting ultra vires of her authority in reaching that agreement. The essence of Respondent's argument is that McKenna's authority to negotiate with the Association was circumscribed by the consent decree and the supervision by the Department of Justice, and that by her failure to comply with the instructions given to her by Ello, McKenna was acting outside the scope of her authority. I find this argument to be wholly without merit.

1. McKenna's actual authority

Local 95's bylaws and the affiliation agreement granted to McKenna full and complete authority to negotiate collective-bargaining agreements in its behalf. Contrary to Respondent's assertions, there is nothing in Ello's testimony from which to conclude that the consent decree or the Department of Justice supervision abrogated that authority. It may well be that McKenna was supposed to try to negotiate into the Association agreement the provisions Ello specified, and it goes without saying that even if she had tried, the Association may not have agreed to the terms. But there is no evidence that the agreement that she did reach, which did not contain those provisions, is considered void in any respect. There was no requirement that the agreement be submitted to either the court or to the Department of Justice for approval.

I find it significant that Respondent did not seek to introduce the consent decree into evidence, the provisions of which presumably would support its argument. I further find it significant that since the imposition of the trusteeship on August 21, there is no evidence that the district court has found either the International or Respondent in violation of the consent decree and no evidence that the court has voided the collective-bargaining agreement in whole or in part. The same observations can be made with respect to the Department of Justice.

The Board regularly finds elected or appointed officials of an organization to be agents of that organization. Although the holding of elective office does not mandate a finding of agency per se, it is persuasive and substantial evidence that will be decisive in the absence of compelling contrary evidence. *Mine Workers Local 1058 (Beth Energy Corp.)*, 299 NLRB 389 (1990). I find no compelling contrary evidence here.

2. McKenna's apparent authority

In addition to her actual authority, McKenna had apparent authority to act on behalf of Respondent. McKenna was the president and business manager of Respondent and held herself out as Respondent's agent. The testimony of Echtman on this point is particularly apt:

> She very clearly conveyed that she was acting for the union. In the course of dealings that I've had with Christine McKenna beginning around the beginning of 1993, she was "it." Anybody else that might have been there with her whether it be Phil Chillack or sometimes John Miller, whoever it was was clearly subservient to Chris McKenna. It wasn't the question of equals. She was the only equal.

Agency may be established under the doctrine of apparent authority when the principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to do the acts in question. Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that the manifestation is likely to create such a belief. *Allegany Aggregates,* 311 NLRB 1165 (1993). McKenna was held out as the agent of Respondent and at no time prior to August 21 did Ello or anyone else on behalf of Respondent do anything to alter that perception. It was far too late for Respondent to allege that McKenna did not have the authority to negotiate on its behalf after the negotiations were concluded and an agreement reached. As stated by the trial examiner in *Aptos Seascape Corp.*, 194 NLRB 540, 544 (1971):

> Stated otherwise, an agent appointed to negotiate a collective bargaining contract is deemed to have apparent authority to bind his principal in the absence of notice to the contrary. . . . The rule, which imposes no hardship on the principal, is dictated by the statutory policy of promoting industrial peace by encouraging collective bargaining. Clearly, the statutory policy would be thwarted by permitting a principal, after his agent has reached agreement, to state for the first time that the latter's authority was limited.

Ello had ample reason to be suspicious of McKenna and her motives, and for reasons best known to himself, made no attempt to remove McKenna from her position of authority prior to her reaching a final agreement with the Association. McKenna had specifically threatened Ello that if he did not approve a loan of money to Local 95, she would negotiate a collective-bargaining agreement which would infringe on the Mason Tenders jurisdiction. Ello did not act on the threat. Ello knew that McKenna was behaving erratically, that there were allegations of open drug use in Respondent's offices and that the local had been surreptitiously placed in bankruptcy. Yet he testified that he nevertheless continued to rely on McKenna's representations that she was complying with his instructions. This testimony is simply not believable. I find that Ello knew that McKenna was virtually out of control and could not be relied upon to follow any kind of instruction. Knowing this, he could have participated in the negotiations himself as a representative of the International, but again, for reasons unknown, chose not to. Nor did Ello make any effort to warn or notify Echtman, D'Agostino or any other employer involved in these negotiations that there were restrictions on McKenna's authority.

Based on all of the circumstances, I find that McKenna had both actual and apparent authority to negotiate on behalf of Respondent prior to August 21, and to bind Respondent to the agreement which resulted from those negotiations.

E. Illegal Contractual Provisions

In its answer, the Respondent avers that the agreement reached is a members-only contract and therefore unenforceable. In its brief, Respondent further argues that the agreement contains an illegal union-security clause and is unenforceable on that ground as well.

Neither article 1(b) nor article 3(a) of the agreement relied on by Respondent establish a members-only contract. Nor was any evidence adduced that the contract was enforced only for the members of Respondent. I therefore find Respondent's first argument without merit.

With respect to the issue of an illegal union-security clause, it is true that article 1(b) does not affirmatively provide for the 7-day grace period for employees to become members of the union. Respondent's argument that this fact renders the entire agreement unenforceable fails for a number of reasons that were set forth succinctly by the Board in *Liberty Cleaners,* 227 NLRB 1296 fn. 2 (1977). Citing *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953), the Board stated:

> We reject Respondent's contention that the illegal union-security clause contained in art. II, par. A, of the collective bargaining agreement voids the entire contract. The provision reads in relevant part: "The Employer agrees to employ only members of the Union in good standing . . . ." We find in agreement with the Administrative Law Judge, that Respondent willingly agreed to the inclusion of the clause in the contract, and Respondent did not claim to the Union that the invalid clause was a basis of its refusal to continue honoring the contract, and we note that the contract contains a saving and separability clause.

Although *Liberty Cleaners* involved an employer as the respondent, the rationale applies equally in this case where the same three factors are present. First, Respondent willingly agreed to article 1(b) of the agreement, which, parenthetically, is the same exact union-security clause as was contained in the 1993–1997 agreement. Second, prior to the pleadings in this case, Respondent never raised the illegality of the union-security clause as the reason for its failure to sign the agreement. Finally, there is a severability clause in the agreement. Respondent may not rely on the existence of an illegal union-security clause, which it negotiated, to evade its obligation to execute the entire agreement.

This has been a case of shifting defenses from the outset. On August 23, Ello told Echtman that the only problem he had with the agreement was that it exceeded the geographical limitations and work jurisdiction of Local 95, a claim which Respondent now appears to have abandoned. Ello specifically told Echtman that he had no problem with the rest of the agreement. There was no mention that the parties had not reached a full agreement, no mention of McKenna acting ultra vires, no mention of a consent decree, no mention that the agreement was a members-only contract and no mention of an illegal union-security clause. These defenses amount to little more than after-the-fact excuses interposed by the posttrusteed Respondent in an effort to avoid being held to the bargain struck by the pretrusteed Respondent. None of them have merit, the agreement is enforceable and Respondent must sign it. By failing and refusing to sign it, I find Respondent has violated Section 8(b)(3) of the Act.

F. The Picketing

The uncontradicted credible testimony establishes that on about October 21, the Respondent picketed the Mackroyce job site at the United States Tennis Center in Queens, New York in order to compel Mackroyce to renegotiate and sign a different contract with the Respondent. I find this conduct violated Section 8(b)(3) of the Act.

CONCLUSIONS OF LAW

1. Mackroyce is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. Since on or about August 16, 1997, Respondent has violated Section 8(b)(3) of the Act by failing and refusing to execute the collective-bargaining agreement between Respondent and Mackroyce.
4. On or about October 21, 1997, Respondent violated Section 8(b)(3) of the Act by picketing a Mackroyce jobsite in order to force Mackroyce to renegotiate the terms of the collective-bargaining agreement previously agreed to by Respondent.
5. The unfair labor practices engaged in by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Respondent shall, on request, execute the collective bargaining agreement with Mackroyce Dismantling, Ltd.[5] Respondent shall make whole those employees of Mackroyce Dismantling, Ltd. covered by the collective-bargaining agreement for any loss of earnings and other benefits suffered by them as a result of Respondent's unlawful fail-

[5] This agreement is G.C. Exh. 6.

ure and refusal to execute the collective-bargaining agreement since August 16, 1997, plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). Respondent shall further make whole all employees of Mackroyce Dismantling, Ltd. for any loss of earnings and other benefits suffered by them as a result of Respondent's unlawful picketing at the United States Tennis Center in Queens, New York, on October 21, 1997, plus interest as computed in *New Horizons for the Retarded,* supra.

[Recommended Order omitted from publication.]